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MICHAEL RODAK, J

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1839

WEST INDIA CARRIERS, INC.,
Petitioner,

vs.

TWENTY GRAND OFFSHORE, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT TWENTY GRAND OFFSHORE, INC. IN OPPOSITION

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OPINIONS BELOW

The opinions of the courts below are correctly recited by Petitioners.

COUNTER-STATEMENT OF QUESTION PRESENTED

Respondent, dissatisfied with the question presented by Petitioner, suggests that the question is more accurately reflected in the following manner:

> ARE MUTUAL CLAUSES IN A TOWING AGREEMENT NEGOTIATED AT ARMS LENGTH, IN GOOD FAITH AND WITHOUT COERCION OR ANY ELEMENTS OF MONOPOLISTIC CAPABILITIES OR OVERREACHING, REQUIRING THAT EACH PARTY TO THE AGREEMENT TAKE OUT INSURANCE COVERAGE, NAMING THE OTHER PARTY AS NAMED INSURED AND WAIVING SUBROGATION RIGHTS AGAINST THE OTHER PARTY, VALID AND ENFORCEABLE AS BETWEEN THE PARTIES, OR ARE SUCH CLAUSES EXCULPATORY, VOID AND INVALID AS BEING AGAINST PUBLIC POLICY.

RESPONDENT'S COUNTER-STATEMENT OF THE CASE

The parties will be referred to as they were in the Court of Appeals, i.e. Petitioners as barge owner and Respondent as tug owner.

Barge owner on pages 3 and 4 of its petition has correctly set forth the language of the towage contract's insurance clause under which each party agreed to insure its own vessel, naming the other as an additional insured, with waiver by the insurer of subrogation against such other party.

The towage contract containing the disputed insurance clause was entered into after barge owner had solicited, received and compared several competitive bids, tug owner's rate being the lowest. Without the disputed clause the towing rate would have been higher. Barge owner entered into the contract without coercion and of its own free choice. There were no monopolistic capabilities among tug operations in the area and in fact the tug market was extremely competitive.

The tug owner complied with its obligations and secured the required coverage. The barge owner insured its barge for its own account but failed to have tug owner named as an insured and failed to obtain in its policies a waiver of subrogation against tug owner; this despite the fact, as the Court of Appeals pointed out (App. 6), such waiver was not objectionable to underwriters.

While the tug was towing the barge, the hawser broke and the barge went ashore on the beachfront at Hallandale, Florida, causing damages to the barge, as well as to beachfront property.

As a result, litigation ensued in the Southern District of Florida involving a claim by salvors against the barge

owner, barge owner's claims against the tug owner for damage to the barge, and indemnity from salvors' claims,[1] and a claim by the owner of the beachfront property against tug owner for damages to the beachfront property. Tug owner filed a petition for exoneration from or limitation of liability. A consolidated trial resulted in a denial of exoneration and limitation of liability, a denial of the salvors' claims for salvage, and the entry of judgment in favor of the barge owner and the beachfront property owner for their respective damages against the tug owner.

The District Court found tug owner negligent and concluded as a matter of law that the insurance clauses were invalid and unenforceable as being indirect exculpatory clauses prohibited by the **Bisso** doctrine;[2] consequently barge owner's breach of its contractual obligation to insure did not preclude it from recovering its damages. Tug owner paid the judgment entered in favor of the beachfront property owner, but appealed the judgment in favor of barge owner.[3] Raising the issue of the validity of the insurance clause.

The Fifth Circuit Court of Appeals reversed holding the insurance clause was valid and enforceable and did not constitute either directly or indirectly an exculpatory clause prohibited by **Bisso, (supra).**

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[1]The majority of barge owner's damages having been paid for or reimbursed by their underwriters who, in actuality, are the real parties in interest in this litigation.

[2]*Bisso v. Inland Waterways Corp.*, (1955) 349 U.S. 85.

[3]The property owner's claim was paid since it was a third party claim not involved in the question of the validity of the insurance clause in the towing agreement.

Barge owner, by the phraseology of the "Questions Presented" and in one paragraph on page 4 of its petition may create an impression which is incorrect. There was no evidence at the trial nor did the District Court find or conclude that the insurance clause was designed to eliminate claims against the tug owner for negligence. Nor, for reasons hereafter pointed out, does it have that effect.

ARGUMENT

Barge owner struggles here, as it has previously struggled, to make its insurer disappear and to give the appearance that it is the real party in interest. Thus, in its petition on page 4, barge owner speaks of "advancements" from its insurer pursuant to "loan receipts", and says that the balance of its damages, "including litigation expenses" were advanced by Petitioner, as if to imply that those payments are in some manner tenuous and recoverable by its underwriter. Such a position is a sham and the real party in interest, at least for the greater bulk of barge owner's damages, is its underwriter.

The significance of this feature becomes important when evaluating the purpose of the insurance clause. Barge owner has suggested to this Court, as well as to the Fifth Circuit Court of Appeals, that the clause was designed to "eliminate claims against the tower." Barge owner's record references on page 4 of its petition do not support such an assertion. Nor do the facts with respect to tug owner's various items of liability and its position concerning them support such assertion; rather, they refute it. So that there will be no question regarding

tug owner's position before the District Court, the Court of Appeals and here, tug owner restates its position:

> Tug owner is ready, willing and able to pay any damages which resulted from its negligence, suffered by any party, including barge owner, for which the barge owner is not or will not be reimbursed by its insurer. Tug owner is not, however, prepared to pay barge owner's insurer's subrogation claim which barge owner contractually and validly agreed to eliminate by entering into the towage contract.

Thus, it is the barge insurer's claim which tug owner resists, taking the position that such insurer cannot and should not be successful in its subrogation efforts by relying upon and taking advantage of its own assured's breach of contract; this particularly in the face of the insurer's contract with barge owner that barge owner's coverage would not be prejudiced by an argument of barge owner which limited tug owner's liability (App. 6, Footnote 3).

Barge owner argues that **Bisso** (supra), **Boston Metals**[4] **and Dixilyn**[5] invalidate clauses in towing agreements which exculpate the tug from its own negligence; the insurance clauses accomplish this result, hence the Circuit Court's decision runs squarely contra to the established law of the Supreme Court. The Fifth Circuit readily recognized this argument as syllogistic, with a false minor premise.

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[4]*Boston Metals v. The Winding Gulf, et al.*, (1955) 349 U.S. 122.

[5]*Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, (1963) 372 U.S. 697.

There is no conflict between the decision of the Circuit Court in this case and the prior decisions of this Court. In the cases relied upon, this Court established the rule that a tug may not contractually exculpate itself from liability for its negligence. Pretermitting the cogency, validity or desirability of such a rule in today's marketplace, the instant clause does not have this intended result nor does it relieve the tug of the effects of its negligence. The clause in the present setting is not exculpatory nor does it insulate the tug owner from the effects of its negligence, either directly or indirectly. In theory and in fact the tug is responsible for its negligence, has been so held and has already paid and will pay damages resulting from that negligence.

This mutual insuring clause designates between the parties which insurer shall bear what loss inter se, and has no effect upon the liability of the tug owner for damages resulting from its negligence, either to third parties or to the barge. The clause shifts liability for paying certian types of losses to a particular insurer but does not shift or purport to shift the ultimate responsibility for negligence.

The problem is not unlike the situation in **Great Lakes Transit Corp. v. Interstate S.S. Co.**, (S.Ct., 1937) 301 U.S. 646, wherein this Court stated:

> "The agreement to obtain marine insurance did not detract from that undertaking. Had the underwriters been unable to respond to their contracts, petitioner would still have been liable to cargo owners upon its engagements. Having assumed that liability, petitioner was undoubt-

edly entitled to take out policies for its own protection."

With the parties' ability to insure themselves against losses from negligence, destruction of property, or otherwise, how does an agreement negotiated at arms length and without coercion fixing which party shall insure what risk exculpate either party from the effects of negligence? The clause, if complied with, does prohibit the barge owner's insurance company from recovering via subrogation losses paid by it to its assured (the barge owner). Such a result, however, is an insurer's option and effects only its rights, not the rights of its assured barge owner.

The instant clause, not exculpating the tug owner from liability for negligence, does not conflict with this Court's holdings in **Bisso** (supra), **Boston Metals,** (supra) or **Dixilyn** (supra), as the Court of Appeals' decision carefully pointed out.

Apparently recognizing the fact that an insurance clause as here involved does not bring the decision of the Court of Appeals in conflict with this Court's ruling in **Bisso** (supra) and **Dixilyn** (supra), and in support of the minor premise of its syllogistic argument, barge owner urges that the Circuit Court's decision further conflicts with the decisions of this Court in **Inman, et al. v. South Carolina Ry. Co.,** (1889) 129 U.S. 128, the decision of the Second Circuit Court of Appeals in **Bradley v. Lehigh Valley R.R. Co.,** (1907) 153 F. 350, and the decisions of District Courts in **The Hadji,** (1884) 20 F. 875, and **The Ferncliff,** (1938) 22 F.Supp. 728. The District Court cases, of course, are not relevant as a basis to exercise

this Court's conflict jurisdiction. Apparently they are cited to this Court because they actually hold what barge owner desires to contend, whereas this Court's and the Second Circuit's decision do not. Based upon those cases barge owner suggests at page 7 of its petition that:

> "The towers continue to borrow contractual devices long since condemned in the carriage of cargo to escape liability for their own negligence as condemned by the decisions of this Court."

This implies that clauses similar to the instant one have consistently been condemned and held to be invalid in the carriage of cargo. Such an assertion fails to stand scrutiny.

To counsel's knowledge, since the **Bisso** decision, no case has held an insurance clause similar or analogous to the instant one in a marine contract invalid. Research reveals seven decisions dealing with marine contracts containing a clause similar to the instant one, i.e., a situation in which one of the contracting parties agreed to obtain insurance naming the other party as an insured or containing an insurer's waiver of subrogation, followed by the obligated parties' compliance with or breach of the requirement to obtain such insurance.[6] Not one of these decisions has held the parties' agreement for such insurance or the insurer's waiver of subrogation in its

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[6]In order of their decision, they are: *Allied Chemical & Dye Corp. v. Tug Christine Moran*, 2 Cir. (1962), 303 F.2d 197, 201; *Allied Chemical Corp. v. Gulf Atlantic Towing Corp.*, E.D. Va. (1964), 244 F.Supp. 2, 6; *Calcasieu Chemical Corp. v. Canal Barge Co., Inc.*, 7 Cir. (1969), 404 F.2d 1227, 1228, 1229; *Slade, Inc. v. Samson Towing Co.*, E.D. Tex. (1970), 327 F.Supp. 555; *Tenneco Oil Co. v. Tug Tony*, S.D. Tex (1971), 324 F.Supp. 834; *Fluor-Western, Inc. v. G & H Offshore Towing Co.*, 5 Cir. (1971), 447 F.2d 35, cert. den. 405 U.S. 922, 92 S.Ct. 959; *In re Port Everglades Towing Co., Inc.*, 5 Cir. (1972), 454 F.2d 276.

policy to be invalid. In five of those decisions, **Bisso** (supra) was urged to invalidate such clauses.[7] In one of the cases, this Court denied certiorari.[8] Contrary to barge owner's assertions, the wealth of modern authorities do not condemn clauses similar to or virtually identical with the instant clauses but rather approve the same.

In reality, not one of the cases relied upon by barge owner stands for the proposition advanced. Indeed, there are no cases except the opinion of the District Court in the instant case, reversed by the Court of Appeals, which even suggest that a clause similar to the present clause in similar circumstances is in any way invalid. The cases cited and relied upon by barge owner to attempt to create a conflict deal with completely different fields of law where different legal principles are applicable, covering common carriage and the relationship between common carriers and shippers. The closest and oldest of the four, **The Hadji, supra.** had no concern whatsoever with the relationship between a tug and its tow and any principles of law enunciated by the District Court have application only to the relationship between a common carrier and the owners of the cargo transported by the carrier, which is an entirely different field of law, with different duties, responsibilities and relationships than exist between a tug and a tow. Furthermore, even the cited decisions seemingly have no application today in any field of law,

[7] *Fluor-Western, Inc. v. G & H Offshore Towing Co.*, 5 Cir. (1971), 447 F.2d 35; *In re Port Everglades Towing Co., Inc.*, 5 Cir. (1972), 454 F.2d 276; *Slade, Inc. v. Samson Towing Co.*, E.D. Tex. (1970), 327 F.Supp. 555; *Tenneco Oil Co. v. Tug Tony*, S.D. Tex. (1971), 324 F.Supp. 834, 837; *Allied Chemical Corp. v. Gulf Atlantic Towing Corp.*, E.D. Va. (1964), 244 F.Supp. 2, 6.

[8] *Fluor-Western, Inc. v. G & H Offshore Towing Co.*, 5th Cir. (1971), 447 F.2d 35, cert. den., 405 U.S. 922.

in view of the enactment of the Carriage of Goods by Sea Act, 46 R.S.C. 1300 through 1315, and the Harter Act, 46 U.S.C. 190 through 194.[9]

For the foregoing reasons, the cases relied upon by the barge owner to exhibit conflict between the Circuit Court's decision in the instant cases and prior cases of this and other Courts are not relevant and do not create such a conflict as is necessary for certiorari.

Finally, barge owner asserts that it, as well as others, have relied upon the prior decisions of this Court condemning provisions having the effect of relieving a tug from its legal liability for negligent towage and that the decision of the Court of Appeals raises important questions thought to have been placed to rest by prior decisions of this Court and upon which towers have relied. To our knowledge, no barge owner has relied upon any decision of this Court or any other court for the proposition that an insurance clause similar to the instant one in a towing contract was invalid.[10] It would be difficult to justify such reliance in view of the numerous decisions involving similar clauses in analagous situations in which the validity of such clauses has been upheld[11] with no reported decisions to the contrary. Tug owner sees no issues of great importance involved herein which have not already been harmoniously handled by the Circuit Courts.

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[9]In the cases of common carriers and shipping of seagoing cargo, Congress has permitted a carrier to relieve itself from liability for certain acts of negligence and Congress in those acts has expressly withheld any attempt to regulate the relationship between private carriers and shippers.

[10]No evidence of any such reliance was offered in this case. Cf. *Crescent Towing & Salvage Corp. v. Dixilyn Drilling Corp.*, §962, 303 F.2d 237 rev'd. 372 U.S. 697.

[11]See Footnote No. 6.

CONCLUSION

The Court of Appeals properly decided the question involved and that barge owner has failed to demonstrate that the Court of Appeals' decision is in conflict with any decision of this Court or any decision of any other Court of Appeal; accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing Brief of Respondent were delivered by mail to RICHARD RALPH, ESQ., Attorney for Petitioner, this 5 day of July, 1974, and that all parties required to be served have been served.

GEORGE W. HEALY, III